APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 73-1273

ALLEGHENY AIRLINES, INC., and G.E.C.C. LEASING CORPORATION, *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 70 C 609 CALE J. HOLDER, Judge

ARGUED FEBRUARY 14, 1974—DECIDED SEPTEMBER 16, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,*[1] and HOFFMAN, *Senior District Judge.*[2]

SWYGERT, *Chief Judge.* Plaintiffs, Allegheny Airlines, Inc. (Allegheny) and GECC Leasing Corp. (GECC) appeal from final judgments entered in favor of defendants, Brookside Corporation (Brookside), Forth Corporation (Forth is a wholly-owned subsidiary of Brookside), the United States, and the estate of Robert W. Carey. As a result of a mid-air collision on September 9, 1969 near Fairland, Indiana between an Allegheny aircraft en route to Indianapolis and a Piper Cherokee aircraft owned by Forth and operated by Carey who was a student pilot, plaintiffs brought suit to recover $3,750,000 for the de-

[1] Judge Kiley approved this opinion before he died on September 6, 1974.

[2] Honorable Julius J. Hoffman of the United States District Court for the Northern District of Illinois is sitting by designation.

struction of Allegheny's DC-9-31 aircraft and to recover $250,000 for a turbojet engine mounted thereon which was owned by GECC.

Pursuant to the Federal Tort Claims Act plaintiffs' claims against the United States were tried to the court while, simultaneously, the plaintiffs' claims against the other defendants were tried to the jury. At the conclusion of plaintiffs' case the district judge entered the following orders which are the subject matter of this appeal: the court granted the Government's motion to dismiss under Rule 4(b) of the Federal Rules of Civil Procedure on the ground that Allegheny was contributorily negligent; on the basis of the court's determination that Allegheny was contributorily negligent, the court applied the doctrine of collateral estoppel to preclude Allegheny from continuing further against the defendants Forth and the estate of Carey; the trial judge granted a directed verdict in favor of Brookside; and dismissed GECC as a party plaintiff on the ground that it was not the real party in interest.

On appeal plaintiffs raise various issues, the most important of which are: (1) whether the district court's findings of fact and conclusions of law that Allegheny was contributorily negligent and thus barred from recovery are supported by substantial evidence and in accord with applicable law, and are not clearly erroneous; (2) whether the trial judge erred in dismissing GECC on the ground that it was not the real party in interest; (3) the propriety of the district court's grant of summary judgment to Forth and the estate of Carey on the ground that Allegheny was collaterally estopped; (4) whether the trial judge erred in entering a directed verdict in favor of Brookside. Plaintiffs also challenge as reversible error certain other rulings of the trial judge which they contend must be corrected in the event a new trial is granted. We reverse and remand for a new trial as to plaintiffs' claims against the United States, Forth, and the estate of Carey but affirm with respect to the defendant Brookside.

I

The mid-air collision between Allegheny's aircraft, Allegheny Airlines Flight 853 (Flight 853), and the Piper

Cherokee aircraft operated by Robert W. Carey occurred at approximately 3:29 p.m. on September 9, 1969 in the airspace northwest of Fairland, Indiana. At the time of the collision Carey, as a student pilot, was engaging in a solo cross-country flight as part of his training for a private pilot's license. The airplane he was operating was owned by Forth Corporation which among other things operated Brookside Airpark and sold, rented, and serviced aircraft as well as provided ground and flight instruction to student pilots such as Carey. Carey had departed from Brookside Airpark, located northwest of Indianapolis, and was heading in a southernly direction, intending to fly to Bakalar Air Force Base located southeast of Indianapolis at Columbus, Indiana. Since Carey possessed only a student pilot's license all his flying was required to be performed in accordance with visual flight rules (VFR) requirements, the most important of which, for purposes of the instant action, was that Carey was prohibited from operating his aircraft closer than 500 feet from the base of any clouds. 14 C.F.R. § 91.105 (1968).

Allegheny Flight 853 departed from Cincinnati, Ohio en route to Indianapolis' Weir Cook Airport at 3:16 p.m. Flight 853 was under an instrument flight rules (IFR) clearance and consequently was operating under the jurisdiction of and in communication with the Indianapolis Air Traffic Control Center. Air traffic controller Masen Grant directed Flight 853 to proceed to Shelbyville, Indiana and then on to Indianapolis at an altitude of 10,000 feet mean sea level (MSL). At approximately 3:23 p.m. controller Grant advised Flight 853 that it was in radar contact and directed it to descend to 6,000 feet. Thereafter, since the aircraft was going to land at Indianapolis, controller Grant was required to terminate his jurisdiction over Flight 853 and transfer air traffic control jurisdiction to the Indianapolis Approach Control facility, the Federal Aviation Agency facility that had jurisdiction for landings at Weir Cook Airport. Grant effected a radar handoff of Flight 853 to Merrill T. McCammack, the arrival radar approach controller at Weir Cook.

At 3:27 p.m. Flight 853 contacted controller McCammack and reported that it was in the process of descending

to 6,000 feet. Approximately twelve seconds later, McCammack responded by requesting the aircraft to identify itself by use of its transponder to enhance its radar signal. McCammack then directed Flight 853 to fly a heading of 280 degrees and to descend to 2500 feet. Allegheny Flight 853 acknowledged these instructions at approximately 3:27.29 p.m.; this was the last known or recorded transmission of Flight 853.

Subsequent to Allegheny's 3:27.29 p.m. confirmation of instructions, McCammack allegedly watched the aircraft turn to 280 degrees on his radar, scanned his radar to determine if there was any other traffic in the area, and, observing none, he admittedly turned his attention from the radar screen to perform certain routine administrative functions which he described as follows:

> "I was observing the target, checking the area in front of the aircraft and to either side to see if there were any aircraft that would be traffic for the flight that I was controlling. I observed no traffic for the aircraft, so then at approximately the time of twenty-nine I looked at the flight progress strip and noticed that I had not marked down the radar handoff time. I looked at the clock and it was approximately twenty-nine and I wrote this time down on the strip. I then coordinated with the departure controller to see if there was any other traffic that he might have that would be a factor for the IFR separation of Allegheny 853, would be following anyone that they might be working that would be landing in Indianapolis ahead of Flight 853. I also checked the weather sequence to make sure that the weather was still the same, checked the wind indicators to see what the wind was presently reading, and I also checked the altimeter to see that the information that the pilot had received was current. After doing these coordinating duties, I looked back to the radar scope and noticed that the target on Allegheny 853 was no longer visible."

While his attention was allegedly diverted, the mid-air

collision occurred at 3:29.13 p.m. and the radar target return for Flight 853 disappeared within seconds thereafter.

McCammack did not observe the collision nor the disappearance of Flight 853 on his radar scope. Nor, did he at any time advise Flight 853 of the presence of the Piper Cherokee aircraft.

The collision occurred at an altitude of approximately 3600 feet MSL with the Piper Cherokee striking Flight 853 from the right at an angle of 106 degrees. Both aircraft crashed to the ground with the wreckage strewn over a site approximately twenty nautical miles southeast of Weir Cook Airport. There were no survivors of the collision.

II

In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence.[3] The findings of the district court which led to its holding of contributory negligence are:

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[3] The district court entered judgment for the United States pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, which provides in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, court shall make findings as provided in Rule 52(a).

It is provided in Rule 52(a) that:

> (a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

"[1.] The collision occurred . . . five hundred feet (500′) or more below the base of the clouds.

"[2.] Allegheny . . . failed to exercise ordinary care . . . under the circumstances in that plaintiff's aircraft was operated by its crew who failed to maintain a lookout for the Piper Cherokee 140 aircraft. . . .

"[3.] Allegheny . . . failed to exercise ordinary care . . . under all circumstances . . . in that its crew conducted the aircraft descent from cruise altitude in an improper manner in that the rate of descent was in excess of five hundred feet (500′) per minute. . . .

"[4.] Allegheny . . . failed to exercise ordinary care . . . under all the circumstances . . . in that its crew conducted the aircraft descent from cruise altitude at a descent rate which was excessive under the circumstances through clouds and which did not permit the plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1000′) above the assigned altitude of two thousand five hundred feet (2500′). . . .

"[5.] Allegheny . . . failed to exercise ordinary care . . . under all the circumstances . . . in that its crew failed to cause the plaintiff's aircraft to give way to the Piper Cherokee 140 aircraft which was converging from the right of plaintiff's aircraft."

Based upon the foregoing findings the district court concluded that Allegheny violated common law and statutory duties of care which were a proximate cause of its injuries. As the following analysis will demonstrate, we are of the view that the district court's findings were clearly erroneous and not supported by substantial evidence.

The critical inquiry in resolving the question of Allegheny's contributory negligence is the distance below the clouds at which the Piper Cherokee aircraft was operating at the time of the collision. Resolution of the other issues as to rate of descent, duty to maintain lookout, and yield

right of way are dependent upon the distance that the Cherokee was flying below the clouds. That is, Allegheny's liability for contributory negligence was directly related to its pilot's ability to see the other aircraft, assess the situation, and take any necessary evasive action to avoid collision.

The district judge made no specific findings as to the altitude of the cloud formations or the altitude of the collision. However, he did enter the general finding that the collision occurred five hundred feet below the base of the clouds. The evidence appears certain, and the parties are agreed, that the collision altitude was approximately 3600 feet MSL. Inferentially therefore, the district judge found that the altitude of the clouds at the collision site was at a minimum of 4100 feet MSL. Without belaboring the point,[4] Allegheny has produced an abundance of evidence to the effect that the altitude of the clouds at the collision site ranged between 3000 to 3900 feet MSL. Allegheny's evidence is persuasive that the Piper Cherokee aircraft piloted by Carey was closer to the clouds than the required distance of 500 feet and that the collision occurred less than 500 feet below the clouds if indeed it did not in fact occur in the clouds. Defendants urge that even in the face of this evidence, which is highly supportive of Allegheny's contention, the district court's finding was proper in view of the following evidence: A weather observation taken at Weir Cook Airport eleven minutes after the collision which placed the base of the clouds above the Indianapolis airport at 4197 feet MSL; the testimony of Allegheny's witnesses Robert F. Johannesen and Charles Bradley was to the effect that there was a layer of clouds extending at uniform height from Weir Cook Airport to the site of the accident. Although Johannesen and Bradley both testified to the uniformity of

[4] Without recounting the testimony of the numerous witnesses and experts produced by plaintiffs, we only note that there was substantial evidence favorable to plaintiffs as to the altitude of the clouds. In addition, we agree with plaintiffs that the trial court erroneously excluded from the evidence the stipulated interphone conversations between the Indianapolis Approach Control facility and the Bakalar Tower relating to the weather conditions at Bakalar.

the cloud base they also testified that the cloud base was between 3500 to 3900 feet MSL. Moreover, Johannesen's observation about the uniformity of the cloud base was made thirty to forty minutes before the accident while Bradley's was made thirty to forty minutes after the collision. The 4197 foot cloud base measured at Weir Cook Airport eleven minutes after the accident was part of a weather formation drifting southeasternly toward the accident site which was some twenty nautical miles away and as such was part of a clearing in the weather coming from the northwest, while the worst weather was to the southeast at Bakalar. In our judgment the evidence emphasized by defendants cannot reasonably support the inference that at the time and place of the accident, twenty nautical miles southeast of Weir Cook Airport and eleven minutes before the weather observation at Weir Cook, the clouds above the accident site were at 4197 feet MSL. We do not think this evidence is of such persuasion as to avoid a determination that the court's finding was clearly erroneous.

Having overturned the district court's implicit finding as to the altitude of the clouds, we necessarily must set aside the court's findings as to Allegheny's duty to maintain a lookout and duty to yield right of way. We do so in light of the fact that an integral element to determining a breach of duty of lookout or failure to yield right of way is whether the Allegheny crew could have seen the Piper Cherokee in a reasonable time to avoid the collision. Most assuredly, if the Piper Cherokee was flying in the clouds at the time of the collision, so that little opportunity existed for Allegheny to see the other aircraft, defendants would be hard pressed to prevail on their affirmative defenses of failure to maintain lookout and yield right of way. Accordingly, findings on these issues are directly dependent on ascertaining the distance between the collision and the base of the clouds.

We must also set aside the district court's findings with respect to Allegheny's rate of descent through the clouds for these findings are likewise controlled by, albeit indirectly, the finding of the altitude of the clouds at the time of the collision and the Piper Cherokee's distance there-

from. Even assuming that Allegheny's rate of descent was excessive under the circumstances, it might be established at a full trial that the Cherokee Piper was flying so near to the base of the clouds that, even if the Allegheny pilot had descended at a lesser and more appropriate rate, he would, nevertheless not have had a reasonable time to see and react to the presence of the Cherokee Piper. Stated otherwise, based on findings of the altitude of the collision and cloud base, it might be established that Allegheny's alleged excessive rate of descent was not the proximate cause of its injuries.

In addition, we set aside, on an independent ground, the district court's finding as to the allegedly negligent nature of Allegheny's descent. There is no evidence in the record that substantiates the finding that Allegheny engaged in an excessive rate of descent. Indeed, the court's holding is contrary to the stipulation of the parties,[5] the uncontradicted testimony as to the custom and practice in the aviation industry,[6] and is contrary to the descent rate procedures recommended by the Federal Aviation Administration. Moreover, we agree with Allegheny that in determining whether the descent rate was excessive under the circumstances, it may appropriately be considered that Allegheny had a right to rely on controller McCammack

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[5] The parties entered into the following stipulation:

"It is hereby stipulated and agreed by and between the parties that the rule of conduct in the aviation industry as of September 9, 1969, was as follows:

"1. During any phase of flight, pilots are required to adhere to the following procedures whenever cleared by ATC to descend or climb to an altitude or flight level.

"'If an altitude change of more than one thousand feet is required, descend or climb as rapidly as practicable to one thousand feet above or below the assigned altitude and then attempt to descend or climb at a rate of five hundred feet per minute until the assigned altitude is reached.'"

[6] With respect to the custom and practice of the industry, it was error for the trial judge to exclude the testimony of American Airlines Captain Robert F. Johannesen as to the appropriate rate of descent. Johannesen's testimony as to the appropriate descent rate was highly relevant in that he had flown an American Airlines aircraft in the same area shortly before the accident with the same clearance.

properly performing his duties and advising the Allegheny crew of the presence of any small aircraft in their path. Likewise, an assessment of Allegheny's rate of descent must take into consideration that the Allegheny pilot need not have anticipated that the Piper Cherokee was being operated less than 500 feet from the base of the clouds in violation of VFR regulations.

Accordingly, for the foregoing reasons we hold that the district court erred in granting the Rule 41(b) motion to dismiss, entered in favor of the United States. In so doing we must also hold as erroneous the grants of summary judgment entered in favor of Forth and the estate of Carey on the basis of collateral estoppel.[7]

III

The district court, on defendants' motion, dismissed GECC as a party plaintiff on the basis that it was not a real party in interest. GECC was the owner of one of the

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[7] Although we need not directly pass on the propriety of the district court's action in implementing the doctrine of collateral estoppel, we are impelled to say that we strongly disapprove of the procedure utilized. We recognize the oddity of the instant litigation—a simultaneous trial of two actions involving the same facts and issues whereas the judge is trier of fact as to one defendant (the United States) while the jury is the trier of fact as to the remaining defendants. By entering a judgment on the merits for the Government and then applying the doctrine of collateral estoppel to preclude further action against the remaining defendants, the trial judge substituted his findings for those which should have properly been determined by the jury. Such a procedure, although otherwise proper in form, in substance short circuits plaintiffs' right to a trial by jury in an action where the evidence is such that it would be most inappropriate to fail to submit the case to the jury by entering a directed verdict. In such circumstances plaintiffs' right to trial by jury is rendered meaningless. Consequently, we are of the view that the application of the doctrine of collateral estoppel was improper in light of the peculiarities of this case. *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), The Government's case could be properly decided by the judge while at the same time plaintiffs' case against the remaining defendants should be submitted to the jury. Moreover, in an effort to avoid inconsistency in verdicts the better practice might be to submit plaintiffs' case to the jury which would function in two capacities: (1) it would render a verdict as to those defendants other than the Government, and (2) it would act as an advisory jury with respect to plaintiffs' case against the Government pursuant to the Federal Tort Claims Act.

engines mounted on the Allegheny aircraft destroyed in the collision which it leased to Allegheny. As part of that leasing arrangement it was agreed that in the event of loss, GECC could demand a replacement engine from Allegheny. Pursuant to that provision, GECC did in fact receive a replacement engine from Allegheny. To the extent GECC received insurance proceeds due to the destruction of its engine, Allegheny and GECC entered into an agreement whereby GECC agreed to deposit the insurance proceeds in an escrow account pending delivery of the replacement engine.

The defendants in effect contend that since GECC obtained a replacement engine from Allegheny, GECC sustained no loss and was not therefore the real party in interest. Defendants' argument runs contrary to the collateral source rule which provides that compensation for loss which is received by a plaintiff from a collateral source independent of the wrongdoer cannot be utilized by the wrongdoer in mitigation of damages. *See e.g., Powers* v. *Ellis,* 231 Ind. 273, 108 N.E.2d 132, 135 (1952); *Mason-Rust* v. *Laborers' International Union, Local 42,* 435 F.2d 939, 945 (8th Cir. 1970).

The lease agreement between Allegheny and GECC was designed for the protection of GECC and not intended as a financial outlet for tortfeasors responsible for the loss. The purpose of the lease agreement is consonant with the purpose of the collateral source rule which is to prevent a defendant tortfeasor from taking advantage of efforts made by a plaintiff to protect himself from loss. Moreover, the collateral source rule rests on the premise that the tortfeasor is not to be punished twice for the identical, singular wrong. In view of the allegations of the complaint, made jointly by Allegheny and GECC, defendants would not be subject to future or multiple claims for loss of the engine. Accordingly, we hold that GECC was a real party in interest and that it was error for the district court to dismiss it from the action as party plaintiff.

IV

Plaintiffs challenge the propriety of the district court's grant of a directed verdict in favor of Brookside Corpora-

tion, the parent and one hundred percent stock owner of Forth Corporation. Plaintiffs urge that Brookside had so dominated and controlled Forth that the latter had become an instrumentality of Brookside. Plaintiffs therefore contend that Brookside was properly charged with liability for the alleged torts of its subsidiary corporation. In our judgment the evidence, when viewed in the light most favorable to plaintiffs, is supportive of but one inference, namely, Forth Corporation was not a mere instrumentality of Brookside.

As we have indicated in our opinion in *Stevens* v. *Roscoe Turner,* 324 F.2d 157 (7th Cir. 1963) a "parent corporation will be responsible for the obligations of its subsidiary when . . . the subsidiary has become its mere instrumentality.' " 324 F.2d at 160. In establishing the fact that a subsidiary is a mere instrumentality of its parent, we stated that the following elements must be proved: (1) control by the parent to such a degree that the subsidiary has become its mere instrumentality; (2) fraud or wrong by the parent through its subsidiary; and (3) an unjust loss or injury to the claimant. 324 F.2d at 160. We need not reach elements two and three for plaintiffs' case fails on the first element.

In ascertaining whether the requisite degree of control by the parent corporation is present so as to warrant a finding favorable to plaintiffs on the first element, we have considered the evidence as it relates to the presence or absence of the following factors:

> "(a) The parent corporation owns all or most of the capital stock of the subsidiary.
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> "(b) The parent and subsidiary corporations have common directors or officers.
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> "(c) The parent corporation finances the subsidiary.
>
> "(d) The parent corporation subscribes to all the capital stock of the subsidary or otherwise causes its corporation.
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> "(e) The subsidiary has grossly inadequate capital.

"(f) The parent corporation pays the salaries and other expenses or losses of the subsidary.

"(g) The subsidary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

"(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

"(i) The parent corporation uses the property of the subsidiary as its own.

"(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

"(k) The formal legal requirements of the subsidiary are not observed." 324 F.2d at 161.

The evidence demonstrates among other things that Forth was adequately capitalized and was engaged in business entirely dissimilar and disassociated with that of its parent (Brookside manufactured industrial fans); there was general adherence to the corporate formalties; Brookside's business with Forth amounted to only one percent of Forth's total business. There is no compelling evidence that Forth as a corporate entity had been reduced to a mere instrument of the parent. Indeed the evidence reflects that at the time of the collision Forth was, although a young organization, a viable independent corporation. To the extent control was exercised by the parent corporation, it was in our judgment no more than what might be expected as necessary for the proper protection of an investment. Accordingly, we affirm the district court's grant of a directed verdict in favor of Brookside.

V

Plaintiffs challenge as erroneous the following rulings by the trial judge: (1) the district court directed a verdict in favor of Forth on plaintiffs' specification of negligence

that Forth was responsible for the negligent acts of Robert W. Carey by reason of the fact that Carey and Forth were engaged in a joint enterprise; (2) the district court struck from plaintiffs' complaint various allegations of negligence which asserted that Forth was responsible for the negligent acts of Carey pursuant to Burns' Indiana Statutes, §§ 14-901, 14-106 and 14-109; (3) the district court directed a verdict in favor of Carey's estate on plaintiffs' specification of negligence that Carey failed to properly plan his flight in that the planned route crossed the descent area utilized by the IFR aircraft landing at Weir Cook Airport; and (4) the district court directed a verdict in favor of Forth on plaintiffs' specification of negligence that Forth improperly trained Carey.

With respect to plaintiffs' claim that Carey and Forth were engaging in a joint enterprise, we are of the opinion that plaintiffs had made out a prima facie case warranting submission to the jury. The essential elements of a joint enterprise are: (1) A community of interest in the object and purpose of the undertaking; (2) an equal right to direct and govern the conduct of the other participant in respect thereto; and (3) a contract, either express or implied, to that effect. *Jones* v. *Hernandez*, 263 N.E. 2d 759, 763 (Ind. 1970). The evidence establishes that Forth and Carey had undertaken a joint enterprise with the objective of obtaining Carey's private pilot's license and that the specific flight resulting in the mid-air collision involved the joint efforts of both in furtherance of their common goal. As to the "community of interest in the object or purpose" requirement, both Carey and Forth were seeking the common objective of obtaining a private pilot's license for Carey. Carey's interest was obvious, his personal convenience and to satisfy his desire to learn to fly. Forth's interest in Carey's success was reflected in the additional business to be derived from Carey as a pilot and other potential pilots who might be drawn to Brookside for training. More important, however, was the fact that Forth's existence as a flight school depended in part on the success of Carey and other student pilots like him in obtaining their private pilot's license on their first attempt. See 14 C.F.R. § 141.11(a)(1). With regard to the second requirement that there be "an equal right to direct

and govern the conduct of the other," Carey had control over the goal of obtaining his private pilot's license in that he alone had the power to determine his rate of progress by the frequency and timing of his flying. Forth had control over Carey which emanated from the instructor-student relationship. In addition, Forth was under an affirmative obligation under the federal air regulations to supervise and control all facets of Carey's training. Moreover, in view of the hazardous nature of Carey's undertaking and his status as a student pilot, we reject any notion which urges that equal control can be established only by a showing of joint presence of the parties at the time of the alleged wrongdoing. Both Carey and Forth had equal control over the attainment of the common objective of securing Carey's private pilot license. The last element of a joint enterprise, "a contract, express or implied" is sufficiently established on the basis of the actions of the parties as well as the express agreements entered into between Forth and Carey.

Addressing plaintiffs' second contention of trial court error we agree that it was improper for the district judge to strike those allegations of plaintiffs' complaint charging Forth with the legal responsibility of Carey's alleged negligence pursuant to Burns' Indiana Statutes §§ 14-901, 14-106 and 14-109. A fair reading of sections 14-901(h) and 1-109[8] charges the absentee owner with the responsibility for the careless and reckless operation of his aircraft by another. While no Indiana cases have interpreted these sections, we note that virtually identical sections in aero-

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[8] It is provided in section 14-901(h):

"(h) Operation of aircraft or operate aircraft—the use of aircraft for the purpose of air navigation, and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state."

Section 14-109 states that:

"• • • It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water in a careless or reckless manner so as to endanger the life or property of another; or to operate an aircraft in the air, or on the ground or water with reckless disregard for the safety, property, or rights of others. • • • In any proceeding

nautical statutes of other states have been interpreted to impose liability upon the absentee owner. *Hays* v. *Morgan*, 221 F.2d 481 (5th Cir. 1955); *Lamasters* v. *Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee* v. *Howe*, 98 N.H. 168, 97 A.2d 223 (1952). We find the foregoing decisions persuasive and agree with plaintiffs that if the Indiana courts had occasion to confront this issue, they would properly interpret sections 14-901(h) and 14-109 as holding the absentee owner financially responsible for the negligent acts of a student pilot to whom he had granted the use of his aircraft. *Ross* v. *Apple*, 240 N.E.2d 825, rehearing denied 241 N.E.2d 872 (Ind. App. 1968).[9]

Lastly, we treat together plaintiffs' challenges to the directed verdicts granted in favor of the estate of Carey and Forth which dealt with certain of plaintiffs' specifications of negligence. Plaintiffs had contended Carey was negligent in planning his flight through the descent area utilized by IFR aircraft landing at Weir Cook Airport. They also claimed that Forth improperly instructed Carey as to various pertinent aspects of flying. On the evidence before us these matters should have been submitted to the jury for determination and not disposed of by way of a directed verdict.

The judgment in favor of Brookside Corporation is affirmed.

The judgments in favor of the remaining defendants are reversed and the causes are remanded for a new trial under the provisions of Circuit Rule 23.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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charging careless or reckless operation of aircraft in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics."

[9] Pursuant to Burns' Indiana Statute § 14-106 plaintiffs have presented facts sufficient to make out a case of negligent entrustment by Forth. Accordingly, this is a matter which should properly be submitted to the jury.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit
Chicago, Illinois 60604
NOVEMBER 26, 1974

Before SWYGERT, *Chief Judge;* FAIRCHILD, CUMMINGS, PELL, STEVENS, SPRECHER, TONE, *Circuit Judges,* and HOFFMAN, *Senior District Judge.*

ALLEGHENY AIRLINES, INC. AND GECC LEASING CORPORATION, *Plaintiffs-Appellants,* No. 73-1273 v. UNITED STATES OF AMERICA, FORTH CORPORATION, ET AL., *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 70 C 609)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the suggestion that it be heard en banc be, and the same are hereby, DENIED.

Judges Stevens and Tone voted to grant said petition for rehearing *en banc.*

APPENDIX C

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires—

(26) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

8-21-3-1 [14-901]. Aircraft Financial Responsibility Act—Definitions.—(1) The following words and phrases when used in this act [8-21-3-1—8-21-3-23] shall, for the purpose of this act, unless a different meaning appears from the context, have the following meanings:

(h) Operation of aircraft or operate aircraft—the use of aircraft for the purpose of air navigation, and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state.

8-21-4-5 [14-106]. Collision of aircraft—Tort liability.—The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land. [Acts 1927, ch. 43, § 6, p. 119.]

8-21-4-6 [14-107]. Jurisdiction over crimes and torts.—All crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this state shall be governed by the laws of this state; and the

question whether damage occasioned by or to an aircraft while in flight over this state constitute a tort, crime or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state. [Acts 1927, ch. 43, § 7, p. 119.]

8-21-4-8 [14-109]. Dangerous operation of aircraft—Operation unlawful while intoxicated or under influence of drugs—Dropping articles or creating hazards—Penalty.—It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water in a careless or reckless manner so as to endanger the life or property of another; or to operate an aircraft in the air, or on the ground or water with reckless disregard for the safety, property, or rights of others. This shall include but not be limited to any trick or acrobatic flying or unnecessary low flying over any thickly inhabited area or public gathering within the state. In any proceeding charging careless or reckless operation of aircraft in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water while under the influence of intoxicating liquor, narcotics, or other habit-forming drugs. It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water who has been diagnosed by a physician as having an active case of epilepsy or similar disorders characterized by lapses of consciousness, or is under the influence of any drug, or medicine for treatment of such disorder which may bring about lapses of consciousness. It shall further be unlawful for any person piloting an aircraft or for any person who shall be a passenger of an aircraft to drop anything from an aircraft in flight which may create any hazard to persons or property. It shall be unlawful for any person to operate an aircraft in the air or on the ground or water or over an open air assemblage of persons, city or town, in such a manner as to cause or bring about an unreasonable disturbance or breach of the peace. Any person found to

be in violation of any part of this section shall be guilty of a misdemeanor and punishable by a fine of not more than two hundred fifty dollars [$250] or imprisonment for not more than six [6] months, or both. [Acts 1927, ch. 43, § 9, p. 119; 1947, ch. 42, § 1, p. 124; 1951, ch. 39, § 1, p. 95.]

APPENDIX D

• • (Caption—IP 70-C-609) • •

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

The plaintiff, Allegheny Airlines, Inc., as such common carrier by air was operating such aircraft at all times in question on a route which included a regularly scheduled flight from the Greater Cincinnati Airport situated near the City of Covington, State of Kentucky, to Weir Cook Airport situated in the westerly part of the City of Indianapolis, where the United States of America operated certain facilities. When the common carrier's aircraft reached a point over Shelby County, State of Indiana, it was descending in preparation for a landing at Weir Cook Airport and was heading in a generally westerly direction when there was a mid-air collision between it and a Piper Cherokee 140 aircraft owned by Forth Corporation and it was leased to and operated by Robert W. Carey, a student pilot of Forth Corporation, in a cross country flight that was generally in a southerly direction from Brookside Airport to Bakalar Airport. The collision occurred in the afternoon five hundred feet (500′) or more below the base of the clouds. The vertical segment of the tail structure collided with the Piper Cherokee 140 aircraft at a point at the juncture of the left wing and the fuselage of the Piper Cherokee 140 aircraft.

Allegheny Airlines, Inc. by and through its employees acting in the course and scope of their employment failed to exercise ordinary care of a common carrier by air under all of the circumstances in that plaintiff's aircraft was operated by its crew who failed to maintain a lookout for the Piper Cherokee 140 aircraft; in that its crew conducted the aircraft descent from cruise altitude in an improper manner in that the rate of descent was in excess of five hundred feet (500′) per minute; in that its crew conducted the aircraft descent from cruise altitude

at a descent rate which was excessive under the circumstances through clouds and which did not permit the plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1000′) about the assigned altitude of two thousand five hundred feet (2500′); and in that its crew failed to cause the plaintiff's aircraft to give way to the Piper Cherokee 140 aircraft which was converging from the right of plaintiff's aircraft.

The conduct of Allegheny Airlines, Inc. was a proximate contributing cause of the mid-air collision and the resulting losses.

The Court has jurisdiction of the parties and subject matter of the action under Title 28 U.S.C. Section 1346(b).

The defendant, United States of America, has proved all of the essential elements and the alleged facts of each element of its second defense of answer to the complaint by the preponderance of the evidence. The plaintiff, Allegheny Airlines, Inc., was guilty of negligence in the operation of its plane which was a contributing proximate cause of the mid-air collision. In operating the plaintiff's aircraft as found, Allegheny Airlines, Inc. violated certain common law and statutory duties. When Allegheny Airlines, Inc. failed to maintain a lookout as found, it violated a common law duty and a duty prescribed by Title 14 C. F. R. Section 91.67(a). When Allegheny Airlines, Inc. conducted the descent of its aircraft at such a rate of descent as found, it violated a common law duty. When Allegheny Airlines, Inc. failed to give the right of way to the Piper Cherokee 140 aircraft as found, it violated a common law duty and a duty prescribed by Title 14 C. F. R. Section 91.67(a)(c).

The law is with the defendant, United States of America, and against the plaintiffs and the defendant is entitled to a Dismissal of the action.

Dated this 29th day of November, 1972.

/s/ Cale J. Holder
Cale J. Holder
Judge, United States District Court,
Southern District of Indiana

APPENDIX E

NAME	MINUTES BEFORE	MINUTES AFTER	LOCATION OF OBSERVATION	IN AIR/ GROUND	TIME G.M.T.	HEIGHT OF CLOUDS OBSERVED	RECORD REFERENCE	REMARKS
Mr. R. F. Johannesen Pilot American A.L.	34		Flew nearly over site to land at Weir Cook	Air	1855	3500 feet mean sea level	T. 3064-6	made as proceeding to land at Weir Cook
Mr. F. Bellamy Weather Observer	31		Bakalar Air Base Columbus, Indiana	Ground	1858	3156 feet mean sea level	T. 495	visual estimate made about 20 miles from crash site
Mr. C. King Private Pilot	18		Flew within a few miles of crash site	Air	1911	3500 feet mean sea level	T. 3294 3298 3301 3302-4	visual estimate
	CRASH							
Mr. Roy Whitehead Private Pilot		9	Flew within a few miles of crash site	Air	1938	3000 feet mean sea level	T. 3264-7	visual estimate
Mr. McColly Weather Observer		11	Indianapolis Weir Cook Airport	Ground	1940	4197 feet mean sea level	T. 430 454-6	measured ceiling, height with ceilometer about 25 miles from crash site

NAME	MINUTES BEFORE	MINUTES AFTER	LOCATION OF OBSERVATION	IN AIR/ GROUND	TIME G.M.T.	HEIGHT OF CLOUDS OBSERVED	RECORD REFERENCE	REMARKS
Mr. Frank Griffith Weather Observer		28	Bakalar Air Base Columbus, Indiana	Ground	1957	3456 feet mean sea level	T. 514-6	visual estimate made about 20 miles from crash site
Mr. Schweibold Helicoptor Pilot		41	Flew over crash site	Air	2010	31-3300 feet mean sea level	T. 3355-8 3359-61	flow to estimated 500 feet of cloud base
Ms. P. Haupt Private Pilot		41	Flew over crash site	Air	2010	3000-3500 feet mean sea level	T. 3384 3389	visual estimate in same plane with Bradley
Mr. C. Bradley Private Pilot		41	Flew over crash site	Air	2010	3600-3900 feet mean sea level	T. 3419-3425	visual estimate in same plane with Haupt
Mr. Frank Griffith Weather Observer		87	Bakalar Air Base Columbus, Indiana	Ground	2057	3256 feet mean sea level	T. 516-7	visual estimate made about 20 miles from crash site
Mr. C. Gossett Expert Weather Witness			None			3700 feet mean sea level (opinion)	T. 3470-71	expert opinion based on weather data available

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEGHENY AIRLINES, INC., AND
G.E.C.C. LEASING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 504 F.2d 104. The findings and conclusions of the district court are unreported.[1]

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[1]Review of the court of appeals judgment is also being sought by Forth Corporation, *et al.* in No. 74-1059. Since that petition for certiorari contains the opinion of the court of appeals and its denial of the petition for rehearing (Apps. A and B) and the findings and conclusions of the district court (App. D), we have not reprinted them herein.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1974. A timely petition for rehearing was denied on November 26, 1974. On February 19, 1975, Mr. Justice Rehnquist extended the time for filing this petition to March 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals improperly undertook the fact-finding function of the district court in violation of Rule 52(a), Fed. R. Civ. P., when, in the face of abundant record evidence substantiating the district court's factual finding that the pilot and crew of an Allegheny Airlines jet aircraft were contributorily negligent, it rejected that finding as clearly erroneous.

STATEMENT

This case arises out of a mid-air collision on September 9, 1969, in the airspace over Fairland, Indiana, 20 miles from Indianapolis, between a commercial plane operated by Allegheny Airlines ("Allegheny") and a Piper Cherokee aircraft operated by pilot Robert W. Carey and owned by the Forth Corporation. All occupants of both aircraft were killed. Suits by representatives of the passengers and crew of the Allegheny jet were settled pursuant to an agreement between Allegheny and the United States whereby Allegheny agreed to pay two-thirds, and the United States one-third, of all settlements or judgments.[2]

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[2]These suits had been transferred (with the instant property damage one) by the Judicial Panel on Multidistrict Litigation to the Southern District of Indiana and assigned to Judge Holder for supervision of pre-trial discovery. *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621. After discovery was completed, the district court issued orders pursuant to 28 U.S.C. 1404 transferring all cases to the Southern District of Indiana and consolidating them for trial.

Allegheny and the United States then settled the passenger and crew suits, and sued for indemnification from the private plane interests (Forth Corporation, *et al.*). The district court's dismissal of this action was reversed by the court of appeals. That reversal is the subject of Forth, *et al.*'s petition for certiorari in No. 74-1060, in which the United States is acquiescing.

This case involves Allegheny's[3] attempt to recover damages for loss of its aircraft from the United States and the owners and operators of the private plane.

Allegheny alleged that the federal air traffic controller's negligence and the negligent operation of the private plane caused the accident, while the defendants maintained that the contributory negligence of the Allegheny crew was the proximate cause of the accident. Allegheny's claims against the government were tried under the Federal Tort Claims Act without a jury (see 28 U.S.C. 2402); claims against the private defendants were tried simultaneously to a jury.

At the close of Allegheny's case, after six weeks of trial, the evidence showed that there was a cloud cover at the time of the accident, and that the student pilot of the private plane was required by his license and federal regulations to fly at least 500 feet from the base of the clouds. If he was doing so, the Allegheny plane should have seen and avoided him; but if the private plane was less than 500 feet from the base of the clouds, the Allegheny plane would not have had sufficient time after it descended from the clouds to avoid the private plane. It was undisputed that the collision occurred at 3,600 feet above sea level. The question at issue was thus the height of the base of the clouds at the time and place of the accident.

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[3]G.E.C.C. Leasing Corp., claiming it owned one of the plane's engines, also sued as a party plaintiff. The district court dismissed G.E.C.C. as a party plaintiff on the ground that it was not a real party in interest, since the engine was simply security for a loan. The "lease" agreement provided that if the engine were destroyed, Allegheny would "replace" it. The "replacement" can be made by substituting the serial number of another engine in this "lease" agreement. The court of appeals reversed, holding that G.E.C.C. was a proper party plaintiff (Pet. No. 74-1059, App. 10A-11A).

The evidence on this issue was conflicting. A concededly accurate instrument measurement taken 11 minutes after the accident at Indianapolis showed a uniform cloud height of 4,197 feet above sea level, *i.e.*, almost 600 feet above the point of collision. Three of Allegheny's witnesses[4] testified that the cloud layer was at a uniform height from the site of the instrument reading to the site of the collision. One of these witnesses, Bradley, made his observations contemporaneously with the accident.[5] On the other hand, several witnesses, including the three who testified concerning the uniformity of the cloud layer, estimated the cloud height at or near the accident at levels ranging from 3,000 feet to 3,900 feet.[6]

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[4]Two pilots and a weather expert.

[5]Bradley testified (by deposition, as he had died before trial) that he was on final approach to land at Indianapolis when he was requested to search for the DC-9 at "about 3:30 or 3:35 on that afternoon" (Tr. 3415). This was almost immediately after the collision, which took place at 3:29. He testified that he reached the accident site within 15 minutes (Tr. 3416). Bradley testified that from the time he was making his approach to Indianapolis, until after he was over the accident site, and even to the time when he returned and landed at Indianapolis, the cloud conditions were the same throughout (Tr. 3430). He testified that the cloud base was well defined (Tr. 3427), and that the condition throughout the afternoon was the same at the crash site and at Indianapolis (Tr. 3419-3420). In light of this evidence, the weather conditions at another airport, Bakalar, which the court of appeals indicated was improperly excluded (Pet. No. 70-1059, App. 7A n. 4), was irrelevant.

[6]The weather expert based his estimate of 3,700 feet on an analysis of weather records, but did not take the instrument reading into account (Tr. 3470, 3486-3488). The other estimates were based simply on the recollected observations of those in the area at or near the time of the accident.

At the close of Allegheny's case, the government moved for dismissal pursuant to Rule 41(b), Fed. R. Civ. P.,[7] contending that the weight of the cloud height evidence showed that the clouds were over 4,100 feet, and thus that the private plane was flying properly at least 500 feet below them. As trier of fact in the Tort Claims Act suit, the district court agreed. It found that "[t]he defendant, United States of America, has proved all of the essential elements and the alleged facts of each element of its second defense of answer to the complaint by the preponderance of the evidence. The plaintiff, Allegheny Airlines, Inc., was guilty of negligence in the operation of its plane which was a contributing proximate cause of the mid-air collision" (Pet. No. 74-1059, App. 22A).[8]

On the basis of this finding, the district court granted the government's motion to dismiss the Federal Tort Claims Act claims. It then granted the private defendants' motions for summary judgment on the related claims against them. Allegheny appealed, arguing that the finding that it was contributorily negligent was clearly erroneous. It contended that the private plane was not 500 feet below the clouds, and, therefore, it was impossible for the Allegheny jet to see and avoid the other plane. Allegheny also asserted that the district judge was prejudiced against it.

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[7]"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant * * * may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff * * *."

[8]Specifically, the district court found that the private plane was properly flying 500 feet below the clouds, and that the Allegheny plane had failed to maintain a proper lookout for the private plane, and to yield the right of way to it as required by the federal air regulations. The court also found that the Allegheny plane had descended at an excessive speed (Pet. No. 74-1059, App. 21A-22A).

The court of appeals reversed.[9] It agreed with the parties that the case turned on the question of the height of the cloud cover. But it disagreed with the district court's resolution of that factual question. The court held it error for the district court to rely upon a "weather observation" taken at Indianapolis airport eleven minutes after the accident showing the clouds to be at 4,197 feet above sea level, and upon the testimony of Allegheny's witnesses that, both prior to and subsequent to the accident, the cloud base at Indianapolis was exactly the same as the cloud base over the accident site (Pet. No. 74-1059, App. 7A-8A). Accordingly, the court of appeals held that the district court's finding that the private plane was flying at least 500 feet below the clouds was clearly erroneous (Pet. No. 74-1059, App. 8A).[10] It remanded the case for a new trial (Pet. No. 74-1059, App. 16A).

The United States petitioned for rehearing; the private defendants petitioned for rehearing and suggested rehearing *en banc*. The petitions were denied on November 26, 1974, Judges Stevens and Tone dissenting (Pet. No. 74-1059, App. 17A).

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because the court of appeals' reversal of the district court's factual findings "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 19(1)(b) of the Rules of this Court.

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[9]The panel consisted of Chief Judge Swygert, Judge Kiley, who died prior to issuance of the opinion, and District Judge Julius J. Hoffman, sitting by designation.

[10]The court also held, *inter alia*, that the finding that Allegheny's descent rate was excessive was in violation of a stipulation of the parties that such descents should be made "as rapidly as practicable" and that the evidence of another pilot concerning the customary rate of descent should not have been excluded (Pet. No. 74-1059, App. 9A). But the court noted that the importance of the finding concerning the descent rate depended on the finding concerning the cloud height (*id.* at 8A-9A).

Rule 52(a), Fed. R. Civ. P., allocates to the district court sitting as trier of fact the sole responsibility for resolving evidentiary conflicts, and for weighing the evidence, as this Court has repeatedly held. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123; *McAllister* v. *United States*, 348 U.S. 19, 20-21; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 278-279; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 37-38. The court of appeals here improperly assumed that responsibility.

The proper application of Rule 52(a) is essential to the effective administration of justice by the federal judiciary, both to insure that the district courts and courts of appeals perform the functions they are assigned, and to prevent further court congestion and delays resulting from unwarranted appeals by disappointed district court litigants hoping for a retrial at the court of appeals level. For these salutary reasons, this Court has often reinstated district court judgments improperly overturned on factual grounds by a court of appeals. *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Snyder* v. *United States*, 350 U.S. 906; *Neese* v. *Southern Railway Co.*, 350 U.S. 77; *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15; *Davis* v. *Baltimore & Ohio R. Co.*, 379 U.S. 671.

The present case, too, clearly calls for the exercise of this Court's supervisory power to enforce the mandate of Rule 52(a). Here, the district court had the difficult task of weighing conflicting evidence in a complex set of circumstances, after years of discovery and a trial in which plaintiffs' evidence alone consumed six weeks.

Although the court of appeals asserted it was reviewing the record only to determine whether there was substantial evidence to support the district court's findings, in fact it reweighed the evidence, and reached a different conclusion concerning which testimony to credit. The errors made by the court of appeals are easily demonstrated, and do not require resort to the lengthy record below for reversal.

The fact that the court of appeals begins its analysis of the evidence concerning the cloud height with the comment that it finds Allegheny's evidence "persuasive" (Pet. No. 74-1059, App. 7A) at least suggests that it was reweighing the evidence, rather than considering whether substantial evidence supports the district court's conclusion.

Moreover, its analysis of the evidence on which the district court relied was erroneous for several reasons. First, the cloud height reading was not simply a "weather observation" (Pet No. 74-1059, App. 7A); it was a concededly accurate instrument reading. Indeed, the cloud height estimates of Allegheny's witnesses could be more accurately so described, since they were simply estimates based on individual recollections. In addition, the court of appeals found it significant that the witnesses who testified to the uniformity of the cloud height also estimated that it was lower than indicated by the instrument reading. But since the clouds could not have been both uniform and at the height the witnesses estimated,[11] it surely was proper for the district court to conclude that the witnesses' observations concerning the uniformity of the cloud cover were more likely to be accurate than their estimates of its height.[12]

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[11]Unless, as was nowhere suggested, the instrument reading was erroneous.

[12]The court of appeals also states that these observations were made 30 to 40 minutes before and 30 to 40 minutes after the accident, apparently suggesting that conditions might have been different at the precise time of the accident (Pet. No. 74-1059, App. 8A). The statement is incorrect; Bradley's observations were contemporaneous (see n. 5, *supra*). In any event, Bradley testified that there was no change in the cloud conditions during the relevant times (Tr. 3430).

In sum, it is apparent from the face of its opinion that the court of appeals improperly reweighed the evidence evaluated by the district court.[13] This total disregard for the important policy underlying Rule 52(a) calls for reversal by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
MICHAEL H. STEIN,
Attorneys.

MARCH 1975.

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[13]The court of appeals' reversal of the district court's finding concerning G.E.C.C.'s interest in the suit constitutes yet another violation of Rule 52(a). See n. 3, *supra*.